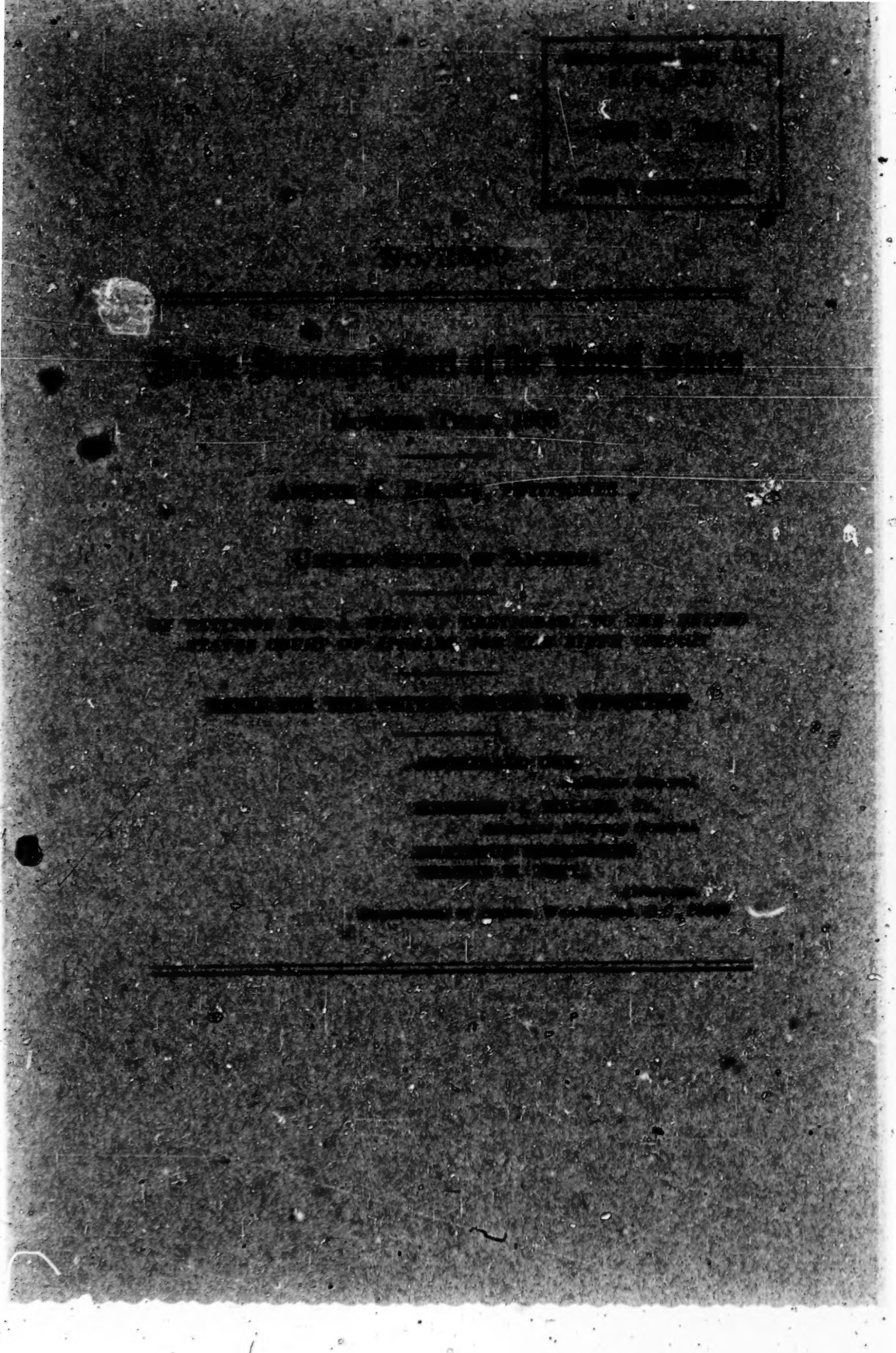

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1089

ARCHIE K. BABSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; 1 R. 58)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1964 (Pet. App. B; 1 R. 59). The petition for a writ of certiorari was filed on May 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court committed prejudicial error in instructing the jury prior to closing argument, and

[1] "R." denotes the 12-volume record on file with the Clerk of this Court.

in failing to advise the jury that a supplemental instruction must be considered together with instructions already given.

RULE INVOLVED

Rule 30 of the Federal Rules of Criminal Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on seventeen counts of a twenty-one count indictment (1 R. 3–23),[2] charging conspiracy to violate (count 1) and substantive violations of

[2] Substantive counts 9, 11, 17 and 19 were dismissed during trial on the motion of the government (1 R. 40).

the mail fraud statute, 18 U.S.C. 1341 (1 R. 38, 40).[*] He was sentenced to imprisonment for a total period of seven years: five years on count one; two years on count two; and two years on each of the remaining counts to run concurrently with the sentence imposed on count one. Petitioner was made eligible for parole, pursuant to 18 U.S.C. 4208(a), at such time as the parole board should determine (1 R. 40). On appeal, the court of appeals affirmed (1 R. 58; Pet. App. A).

The evidence, which is not in dispute, is set out in the opinion of the court of appeals. In essence, it showed that in early 1956 petitioner formed a "Jet Training" school and thereafter engaged with others in a fraudulent scheme to sell courses of study in the school by false promises and representations. The gist of these misrepresentations, many of which were contained in pamphlets and circulars mailed out by petitioner, was that the school and its training course were approved by major airlines and makers of jet engines; that upon successful completion of the course one became a qualified jet expert technician, eligible for positions at a salary ranging from $8,000 to $15,000; and that many graduates had obtained such employment. Some 1400 of these courses were sold. The evidence showed that these representations were knowingly untrue.

After all the evidence was in, but before closing argument, the trial court instructed the jury, initially pointing out that this procedure had been worked out after discussion with counsel and that after

[*] A co-defendant, Victor J. Trial, was found guilty on the conspiracy and two substantive counts (1 R. 39, 40).

the closing argument he would give additional instructions (12 R. 1655–1656). No objection was made to these instructions at that time (12 R. 1678). Following argument of counsel, the court gave additional instructions, pointing out again that the jury had to find guilt beyond a reasonable doubt and that the verdict had to be unanimous, and explaining the forms of the verdict (12 R. 1681–1687).

After some seven and one-half hours of deliberation, the jury requested the court to instruct it "again on law pertaining to conspiracy" (12 R. 1688). In response, the trial court repeated his previous instructions on conspiracy and recapitulated the aider and bettor principles bearing on the substantive charges (12 R. 1689–1691). It refused, however, to instruct again on "reasonable doubt" or to repeat that the jury, in order to convict, must find a wilful and knowing violation of the statutory provisions in question (12 R. 1695–1696). The court said that the instructions "were adequate in view of the inquiry" and that it was unnecessary "to repeat all of the instructions previously given to the jury" (12 R. 1696).

The court of appeals, in affirming the conviction, expressed the view that the district court had erred in instructing the jury before closing argument and in failing to advise the jury that the supplemental instructions should be considered together with all of the other instructions previously given. It ruled, however, that in the circumstances, these were not errors of sufficient magnitude to warrant reversal (Pet. App. A vii–viii).

ARGUMENT

There is no occasion to review the ruling of the court of appeals that the errors of procedure which it found did not warrant reversal of the conviction. In view of the opinion of the court disapproving the practice followed in this case, the issue is not likely to recur. The finding that the errors did not prejudice petitioner and therefore did not warrant reversal is justified by the record.

The procedure of instructing the jury before closing arguments was apparently acquiesced in by defense counsel, and no prejudice is shown by the departure from Rule 30 of F.R. Cr. P. Nor can prejudice be found from the fact that the trial court failed to advise the jury that the supplemental instruction had to be considered with all instructions previously given. This is not a case like *Bland* v. *United States*, 299 F. 2d 105, 108–109 (C.A. 5), where there was a real danger that the supplementary instruction might mislead the jury into believing that it was authorized to convict the defendant without proof of knowledge. Nor is it akin to *Berger* v. *United States*, 62 F. 2d 438, 439–440 (C.A. 10) where, in its supplementary instructions, the court improperly commented on the evidence to the detriment of the accused. Here, in response to a question as to conspiracy, the court restated the law on conspiracy and made some comments on aider and abettor principles which were closely related to the question asked. The judge thought it unnecessary, in view of the specific nature of the question, to go into other matters. While, as the court below held, the jury might well have been reminded to

consider the other instructions as well, there is no reason to assume that they did not do so. Their acquittal of the co-defendant Trial on various substantive counts indicates their awareness of the other instructions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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